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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1103. 715 402/30

JAMES M. SEIBERT, COLLECTOR OF CAPE GIRARDEAU COUNTY, MISSOURI, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES EX REL: GEORGE W. HARSHMAN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 16, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Missouri, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, at the September term, 1884, thereof, between The United States *ex rel.* George W. Harshman, relator, and James M. Seibert, collector of Cape Girardeau, Missouri, respondent, a manifest error hath happened, to the great damage of the said respondent, as by complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 6th day of November, in the year of our Lord one thousand eight hundred and eighty-four.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk Circuit Court United States, Eastern District of Missouri.
By —— ——, *Deputy.*

Allowed by—
SAMUEL TREAT, *Judge.*

2 *Return to Writ.*

UNITED STATES OF AMERICA,
Eastern District of Missouri, } *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at office in the city of St. Louis, this third day of October, A. D. 1885.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk of said Court.

[Endorsed:] No. 1766. United States circuit court, eastern disrtict of Missouri. U. S. *ex rel.* Geo. W. Harshman *vs.* James M. Seibert, collector. Writ of error to the circuit court of the U. S., eastern dist. of Missouri. Returned and filed 6th day of Nov., 1884. A. P. Selby, clerk.

3 The United States of America to the United States *ex rel.* George W. Harshman, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C. on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein James M. Seibert, collector of Cape Girardeau county, Missouri, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgement rendered against the said plaintiff in error, as in the said writ of errer mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Treat, judge of the circuit court of the United States for the eastern district of Missouri, this 6th day of November, in the year of our Lord one thousand eight hundred and eighty-four.

SAMUEL TREAT,
Judge United States Circuit Court, Eastern District of Missouri.

3½ UNITED STATES OF AMERICA,
Eastern District of Missouri, } ss:

I have executed this writ on the 31st day of August, A. D. 1885, by serving a duly certified copy of the same upon Clinton Rowell, the attorney of record for the relator, at St. Louis, in the above district.

J. E. D. COUZINS,
United States Marshal.
P'r THOS. E. BENNETT, *Dep'y.*

Fees:

Service	$2 00
1 M. travel	06
	$2 06

[Endorsed:] No. 1766. United States circuit court, eastern district of Missouri. U. S. *ex rel.* Geo. W. Harshman *vs.* James M. Seibert, collector. Citation. Filed Nov. 7, 1884. A. P. Selby, clerk.

4 *Petition for Mandamus Filed.*

UNITED STATES OF AMERICA,
Eastern District of Missouri, } ss:

In the Circuit Court of the United States in and for said District.

Be it remembered that on the 11th day of October, A. D. 1884,

the following among other proceedings were had and appear of record in said court, to wit:

UNITED STATES *ex rel.* GEORGE W. HARSHMAN, Relator,
vs.
JAMES M. SEIBERT, Collector of Cape Girardeau County, Missouri, Respondent. } 1766.

Now comes the said relator, by his attorney, and presents to the the court a petition for mandamus against said respondent to collect the tax heretofore levied by the county court of said county to pay the judgment heretofore rendered in favor of said relator and against said county, with interest thereon and costs. Upon consideration whereof it is ordered that an alternative writ of mandamus issue herein, to be directed to the said respondent, James M. Seibert, collector of said Cape Girardeau county, commanding him forthwith to make collection of said tax heretofore levied by said county in the manner prescribed by law for the payment of said judgment, interest and costs, or that he show cause before this court, on or before the 27th day of October, 1884, why he refuses so to do. It is further ordered that as soon as said taxes shall have been so collected he shall report the same according to law.

5 Said petition for mandamus is in the words and figures following, to wit:

Petition for Mandamus.

In the United States Circuit Court for the Eastern District of Missouri. September Term. A. D. 1884.

In re GEORGE W. HARSHMAN
against
THE COUNTY COURT OF CAPE GIRARDEAU COUNTY, MISSOURI, and JAMES M. SEIBERT, Sheriff and Collector of Taxes of said County.

Your petitioner, George W. Harshman, would respectfully show unto this honorable court that on the 16th day of February, A. D. 1882, he recovered a judgment in this court against said Cape Girardeau county for the sum of $4,391.24 and costs, taxed at $87.70, which judgment bears interest from said date at the rate of 6 per cent. per annum, for bonds and for the interest thereon issued in behalf of Cape Girardeau township, in said county, in aid of Cape Girardeau and State Line Railroad Company, under the laws of this State made and provided; that on the 25th day of September, A. D. 1882, the said county having failed to pay said judgment, or any part thereof, an alternative writ of mandamus was issued by this court commanding them, the said county court, to levy a tax upon all the property in said township of Cape Girardeau made taxable by law and pay said judgment, interest & costs; that on the 4th day of May, A. D. 1884, this honorable court issued on said application a peremptory writ of mandamus commanding said court to levy said tax as prayed in said petition for an alternative writ and as directed in said alternative writ; that at the regular May term of said

court of the county of Cape Girardeau for the year 1882 the said county court did cause to be levied a tax for the payment of
6 said judgment, with others rendered by this court, of which the said court made a return to this court on the 13th day of September, 1883, the full particulars of which levy will appear from said return, which is made a part hereof for that purpose.

Your petitioner further states that James M. Seibert is the lawfully-authorized collector of said county; that said levy of taxes so ordered by said county court was duly extended upon the tax-books of said county for collection, and was duly delivered to said collector for collection, with the regular tax-books for the taxes of the year 1883, for collection.

Your petitioner further states that after the receipt of said tax-books the said collector was proceeding to collect said special tax as provided by law, and while so engaged in the lawful discharge of his duty one Garner, county attorney of said county, caused to be presented to Hon. J. D. Foster, judge of the 10th judicial district of said State, a petition in the name of the State of Missouri upon the relation of said Garner as prosecuting attorney of said county and against Wm. Hoge, Samuel Hitt, and Robert Snider, judges of said county court, and Gabriel C. Pepper, clerk of said court, and the said James M. Seibert, collector as aforesaid, in which petition it was alleged that said tax was levied as aforesaid, and that said levy was in violation of law because of the illegality of said bonds, and an application was made to said judge in vacation to enjoin the collection of said tax; that on the 29th day of December, A. D. 1883, said judge made an order restraining the said parties and each and all of them from collecting or attempting to collect said tax so levied as aforesaid or any other tax so levied at said May term denominated a railroad tax until the matters and things alleged in said
7 petition could be heard, and the clerk of said circuit court was ordered to make a copy of said order, which was duly served upon each of said defendants.

And your petitioner further states that from and after the service of said order the said James M. Seibert has ceased all efforts to collect said tax, and has failed and refused to collect the same or make any efforts to do so.

Your petitioner further states that said order of said Hon. J. D. Foster is without authority of law and had an unwarrantable interference with the process of this court, and your petitioner would pray this honorable court that, notwithstanding said pretended order of injunction herein recited, that the said collector and his successors in office be ordered and commanded by this court to proceed forthwith to make collection of said tax heretofore levied by said county court in the manner prescribed by law for the payment of said judgment or show cause to this court on or before the 27th day of October why he should not do so, and that as soon as said taxes shall have been so collected he shall report the same according to law and for other and further relief.

FISHER & ROWELL,
Att'ys for Relator.

Alternative Mandamus.

And thereupon there was issued in said cause a certain alternative mandamus, which, together with the marshal's return endorsed thereon, is in the words and figures following, to wit:

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

The President of the United States of America to James M. Seibert, collector of Cape Girardeau county, Missouri, Greeting.

8 Whereas it has been suggested to our circuit court of the United States for the eastern district of Missouri that George W. Harshman, the relator herein, on the 16th day of February, A. D. 1882, recovered a judgment in this court against said Cape Girardeau county for the sum of $4,391.24 and costs, taxes at $87.70, which judgment bears interest from said date at the rate of 6 per cent. per annum, for bonds and for the interest thereon issued in behalf of Cape Girardeau township, in said county, in aid of this State, made and provided; that on the 25th day of September, A. D. 1882, the said county having failed to pay said judgment, or any part thereof, an alternative writ of mandamus was issued by this court, commanding them, the said county court, to levy a tax upon all the property in said township of Cape Girardeau made taxable by law, and pay said judgment, interest and costs; that on the 4th day of May, A. D. 1884, this court issued on said application a peremptory writ of mandamus commanding said court to levy said tax as prayed in said petition for an alternative writ, and as directed in said alternative writ; that at the regular May term of said court of the county of Cape Girardeau for the year 1883 the said county court did cause to be levied a tax for the payment of said judgment, with others rendered by this court, of which the said court made a return to this court on the 13th day of September, 1883, the full particulars of which levy will appear from said return; that James M. Seibert is the lawfully authorized collector of said county; that the said levy of taxes so ordered by said county court was duly entered upon the tax-books of said county for collection, and was duly delivered to said collector for collection, with the regular tax-books for the taxes of the year 1883 *for collection;* that after the receipt of
9 said tax-books the said collector was proceeding to collect such special tax as provided by law, and while so engaged in the lawful discharge of his duty one Gardner, county attorney of said county, caused to be presented to Hon. J. D. Foster, judge of the 10th judicial district of said State, a petition, in the name of the State of Missouri, upon the relation of said Gardner as prosecuting attorney of said county, and against Wm. Hoge, Samuel Hitt, and Robert Snider, judges of said county court, and Gabriel C. Pepper, clerk of said court, and the said James M. Seibert, collector as aforesaid, in which petition it was alleged that said tax was levied as aforesaid, and that said levy was in violation of law because of the illegality of said bonds, and an application was made to said judge in vacation to enjoin the collection of said tax; that on the 29th

day of December, A. D. 1883, said judge made an order restraining the said parties, and each and all of them, from collecting or attempting to collect said tax so levied as aforesaid, or any other tax so levied at said May term, denominated a railroad tax, until the matters and things alleged in said petition could be heard, and the clerk of said circuit court was ordered to make a copy of said order, which was duly served upon each of the said defendants; that from and after the service of said order the said James M. Seibert has ceased all efforts to collect said tax, and has failed and refused to collect the same or make any efforts to do so; that said order of said Hon. J. D. Foster is without authority of law and was an unwarrantable interference with the process of this court.

Now, therefore, we, being willing that due and speedy justice be done in the premises, do command you, the said James M. Seibert, collector of Cape Girardeau county as aforesaid, that, notwithstanding said pretended order or injunction hereinbefore recited,
10 you proceed forthwith to make collection of said tax heretofore levied by said county court in the manner prescribed by law for the payment of said judgment, interest and costs, and that as soon as said taxes shall have been so collected you report the same according to law, or that you show cause before this court on the 27th day of October, 1884, why you refuse to do so.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 13th day of October, in the year of our Lord one thousand eight hundred and eighty-four.

Issued at office in the city of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] A. P. SELBY,
Clerk of Said Court,
By T. L. CRAWFORD, *D. C.*

Marshal's Return.

UNITED STATES OF AMERICA,
Eastern District of Missouri, } *ss:*

Executed this writ on the 23d day of October, 1884, by serving said writ on James M. Seibert, collector, the within-named respondent, at Oak Ridge, Cape Girardeau Co., in above district.

JNO. E. D. COUZINS,
United States Marshal,
P'r O. K. WHEELER, *Dep'y.*

11 And afterwards, to wit, on the 3rd day of November, A. D. 1884, there was filed in said cause a certain answer of Jas. M. Seibert to alternative writ of mandamus, which said answer is in the words and figures following, to wit:

Answer of Jas. M. Siebert to Alternative Mandamus.

In the Circuit Court of the United States in and for the Eastern District of Missouri. September Term, 1884.

UNITED STATES, upon the Relation of GEORGE W. HARSHMAN, Relator,

vs.

JAMES M. SIEBERT, Collector of Cape Girardeau County, Missouri, Respondent.

Now comes the said respondent, James M. Siebert, and for his return to the alternative writ of mandamus herein admits that he is the collector of the county of Cape Girardeau, Missouri; admits that on the 16th February, 1882, in this court, said relator, George W. Harshman, obtained a judgment against said county of Cape Girardeau for the sum of $4,391.24 and costs; that said judgment remaining unpaid, this court, on the application of said relator, on the 4th day of May, 1883, issued its peremptory writ of mandamus to the judges of the county court of said county, requiring said county court to levy a tax on all the property in Cape Girardeau township, of said county, taxable by law, and that in obedience to said mandamus said county court did, at its May term, 1883, order to be levied a tax to pay said judg-
12 ment, together with other judgments of a similar nature; that said tax so ordered was entered on the tax-books of said county, and the books passed into the hands of respondent for the purpose of collecting the tax so ordered, and respondent, acting in obedience to the said order of said county court, entered upon the official task of collecting said tax with all diligence and fidelity, did collect a part of the same (about $1,400), and was in the active execution of said order of said county court collecting said tax when he was prevented from doing so by means of the process and proceedings hereinafter mentioned.

Respondent states that the said judgment of said relator was founded not upon bonds issued in behalf of said Cape Girardeau township in aid of said railroad company, as recited in the alternative writ of mandamus, but on interest coupons of said bonds, the same being for interest on unmatured bonds of the character mentioned in said alternative mandamus to the amount of over $5,000.00, principal, as by reference to the record in said cause will appear.

Respondent further states that the tax ordered to be levied as aforesaid by said county court was a special tax of two per cent. on all the real estate and personal property in said Cape Girardeau township subject to taxation, including statements of merchants and manufacturers doing business in said township, whereas by [the] law under which said bonds were issued a tax to pay the same could be levied only on the real estate in said township, said special tax amounting to over $15,000, and was for the special purpose of paying the aforesaid judgment of relator and the other said judgments of like character and for no other purpose, and was in addition to the regular State and county taxes levied for that year.

13 Respondent further states that after said county court ordered said special tax to be levied as aforesaid, and while respondent was in the act of collecting the same as aforesaid, a certain suit was begun in the circuit court of Cape Girardeau county, Missouri, which is a court of general jurisdiction in law and equity and had jurisdiction of that matter, wherein the State of Missouri, at the relation of Maurice Cramer, prosecuting attorney of Cape Girardeau county, was plaintiff, and the judges and clerk of said county court, in their official capacity, and this respondent, in his official capacity, were defendants, the general object and nature of which said suit was to enjoin the collection of said tax, not, as recited in said alternative mandamus, on the ground that said bonds were illegal, but on the ground that said tax was not levied in the manner and by the officers or authority required by the law of the State of Missouri, and it was levied, not on the real estate alone, but also against personal property in said township. The petition in said writ was in the words and figures following, to wit:

Injunction.

In the Circuit Court of Cape Girardeau County, Missouri. To the May Term, A. D. 1884.

THE STATE OF MISSOURI *ex rel.* MAURICE CRAMER, Prosecuting Attorney of Cape Girardeau County, Missouri, Plaintiff,

vs.

14 WILLIAM HAGER, SAMUEL HITT, and ROBERT SNIDER, Judges of the County Court of Cape Girardeau County, Missouri; Gabriel C. Pepper, County Court Clerk, and James M. Seibert, Collector of Cape Girardeau County, Mo., defendants.

The petition of plaintiff respectfully shows that he is prosecuting attorney of Cape Girardeau county, State of Missouri, and further states that defendants, William Hager, Samuel Hitt, and Robert Snider are the judges of the county court of Cape Girardeau county and Gabriel C. Pepper the clerk thereof.

That as such said judges have the power to levy and cause to be collected the State tax and tax necessary to pay the funded or bonded indebtedness of the State, together with the tax for current county expenses and for schools, and beyond this they have no power or authority to levy or cause to be collected any tax except upon the order of the circuit court of said county, or of the judge thereof, made in vacation, as by the statutes of the State of Missouri in such cases made and provided.

And plaintiff says that at the May term, A. D. 1883, of the county court of said county said William Hager and others, judges as aforesaid, caused to be levied and ordered to be collected as other taxes, &c., a tax of two per centum on all the taxable property of Cape Girardeau township, in said county, &c., which said two per centum tax was not for State tax and tax necessary to pay the funded or bonded debt of the State, nor was it a tax for current county expenses and schools or either.

That said county court, before making the levy and order as aforesaid, did not make or cause to be made an application
15 to the circuit court of said county, nor to the judge thereof, in vacation, for an order to have assessed, levied, and collected said two per cent. tax, nor was any such order, in fact, made by such court or the judge thereof in vacation.

That, on the contrary, said county court, in violation of the statutes in such cases made and provided, and in usurpation of their powers, had assessed and levied, and are now trying to have collected, said two per cent. tax at its assessed valuation of all the taxable property of said township, without said permission or order of said court, in violation of their duties and without authority of law.

Plaintiff further states that the said county court of Cape Girardeau county, in the year A. D. 1869, for and in behalf of the said township, in the said county, caused to be issued one hundred and fifty thousand dollars in bonds by virtue and authority of the act of the General Assembly of the State of Missouri, approved March 23d, 1868; that the aforesaid levy of the two per cent. tax was made for the purpose of paying off a portion of the said bonded debt, and is in violation of the said act, because levied upon all the real and personal property within said township.

That James M. Seibert, one of the defendants herein, is the collector of said county, and that he is now threatening to collect said tax so illegally assessed as aforesaid, and threatens, as this plaintiff is informed and believes, to distrain enough personal property belonging to the tax-payers of said township to pay said tax, and, where this is insufficient, to proceed to recover the same by other means, &c.

Plaintiff says that the whole amount of taxes so levied as aforesaid amounts to about fourteen or fifteen thousand dollars.

16 Wherefore, the premises considered, plaintiff prays that an injunction issue restraining defendants herein and their successors in office from collecting, or attempting to collect, said tax, and on final hearing that said injunction be made perpetual, and for all other equitable relief that is right and proper.

MAURICE CRAMER,
Prosecuting Attorney.

And respondent further says that after due notice to him and the other said defendants the plaintiff in said suit applied to the Honorable John D. Foster, judge of the tenth judicial circuit of Cape Girardeau county, in vacation, on the 29th December, 1883 (the said judge in vacation having jurisdiction in the premises and full power and authority to make such order), for an injunction to restrain respondent from collecting said special tax as prayed in said petition, and thereupon the said John D. Foster, judge as aforesaid, made an order of temporary injunction as prayed in said petition absolutely enjoining and prohibiting this respondent from collecting or attempting to collect said tax until the matters and things stated in said petition could be inquired of by the said circuit court of Cape Girardeau

county, which said order of injunction was duly served on the respondent, and in obedience thereto, and not until then, he ceased to collect said tax; that said temporary writ of injunction was returnable to the May term, 1884, of the said circuit court of Cape Girardeau county, at which term respondent appeared and filed his answer to said suit in the words and figures following, to wit:

17 *Separate Answer of J. M. Seibert.*

In the Circuit Court of Cape Girardeau County, Missouri. May Term, 1884.

STATE *ex rel.* MAURICE CRAMER, Prosecuting Attorney of Cape Girardeau County, Missouri,
vs.
WILLIAM HAGER *et al.*

Now comes James M. Seibert, one of the defendants in the above-entitled cause, and for his separate answer to plaintiff's petition says that he is now, and has been since — day of —, 187–, the collector of the revenue within and for the county of Cape Girardeau, State of Missouri, and that as such he received from the county clerk of Cape Girardeau county on the — day of —, A. D. 1883, the tax-books of said county, in which were extended in a separate column in said books for said year 1883 a special tax of two per cent. upon all the taxable property in Cape Girardeau township, in Cape Girardeau county, Missouri; that by virtue and authority of said tax-books upon which said special tax had been regularly and legally extended, and by virtue and authority of the statute law of this State, he proceeded to collect said tax, and was using his lawful authority so to do, until enjoined from any further effort in that behalf by a restraining order of this court. And defendant further says that the said special tax upon the taxable property of said township was duly and legally extended by the county clerk of said county of Cape Girardeau in the regular tax-books of said county, in obedience to an order of the county court of said county made and entered on the 23d day of May, 1883, the same being the 3d day of the reg-
18 ular May term of said county, it being the same time at which the State and county taxes were extended, and that after having so extended said tax the said tax-books were by said clerk delivered to this defendant; that by virtue of the said tax-books so as aforesaid delivered to him, and not otherwise, he has attempted to collect said tax.

Having fully answered, defendant prays the court to be hereof discharged.

J. M. SEIBERT,
By R. H. WHITELAW,
His Attorney.

And respondent in good faith made all the defence to said suit that he was advised he could make.

That said cause came on to be heard and determined in said cir-

cuit court of Cape Girardeau county at the August term of 1884. A final decree was entered therein perpetually enjoining respondent from collecting said tax, which decree is in the words and figures following, to wit:

Civil Action. Injunction.

Cape Girardeau County Circuit Court. August Term, 1884.

Monday, Sept. 1st, seventh day of the term, the following, among other, proceedings were had:

THE STATE OF MISSOURI *ex rel.* MAURICE CRAMER, Prosecuting Attorney of Cape Girardeau County, Missouri, Plaintiff,

vs.

WILLIAM HAGER, SAMUEL HITT, and ROBERT M. SNIDER, Judges of the County Court of Cape Girardeau
19 County, Missouri; Gabriel C. Pepper, County Clerk, and James M. Seibert, Collector of Cape Girardeau County, Defendants. } 2120.

Now come the parties in the above-entitled cause by their attorneys, and this cause coming on to be heard, all and singular the matters being submitted to the court, seen, and heard, the court doth find that Maurice Cramer is the prosecuting attorney of Cape Girardeau county, Missouri.

The court further finds that William Hager, Samuel Hitt, and Robert M. Snider are the judges of the county court of said county, and Gabriel C. Pepper the clerk of said county court.

The court further finds that James M. Seibert is the collector of said county of Cape Girardeau.

The court further finds that in the year 1869, in pursuance of the provisions of an act entitled "An act to facilitate the construction of railroads in the State of Missouri," approved March 23d, 1868, the county court of Cape Girardeau county, in behalf of the township of Cape Girardeau, in said county, subscribed $150,000.00 to the capital stock of Cape Girardeau and State Line Railroad Company, a corporation duly organized and incorporated under the laws of Missouri, and issued bonds in that sum, with interest coupons attached, running twenty years and bearing eight per cent. interest.

The court further finds that the Ninth National Bank of the City of New York, John T. Hill, Valentine Winter, George W. Harshman, and Elisha Foote obtained judgments in the United
20 States circuit court for the eastern district of Missouri on certain interest coupons detached from bonds so as aforesaid issued by the said county court for and [in] behalf of said township, amounting, in the aggregate, to about the sum of $15,000, and afterwards obtained from said United States circuit a peremptory writ of mandamus directed to the said county court of Cape Girardeau county commanding said county court to levy a tax on all the taxable property in Cape Girardeau township for the purpose of satisfying and paying said judgments.

The court further finds that in pursuance of said peremptory writ of mandamus the said county court, at its May term, 1883, it being the same term of court at which the levy of taxes for State and county purposes was made for the year 1883, caused to be levied a tax of two per cent. on all taxable, real and personal, property in Cape Girardeau township, including the statements of merchants.

The court further finds that such two per cent. tax was thereupon extended by the county clerk of said county on the tax-books for the year 1883 in a separate column, and that said tax-books, so embracing the said two per cent. tax, were afterwards duly delivered to the collector of said county, to wit, defendant James M. Seibert, and that the said collector, at the time of the institution of this suit, was proceeding and endeavoring to collect the said two per cent. tax as other taxes for State and county purposes.

The court further finds that the said county court, before levying the said two per cent. tax, did not cause the prosecuting attorney of its said county to present to the circuit court thereof, nor to the judge of said circuit court in vacation, a petition setting forth the facts and specifying the reasons why such two per cent. tax should be
21 assessed, levied, and collected, nor any petition whatever in that behalf, as required by section 6799 of the Revised Statutes of the State of Missouri, and that no order was made by the said circuit court of Cape Girardeau county, nor by the judge thereof in vacation, for the assessment, levy, or collection of said two per cent. tax now here sought to be enjoined.

And the court further finds that the levy and assessment of the said two per cent. tax was illegally made, and that said tax is null and void, and the collection thereof ought to be restrained.

Wherefore it is considered, ordered, and adjudged by the court that the motion of defendants to dissolve the temporary injunction heretofore granted in this cause be in all things overruled; that this injunction be made perpetual, and that the said James M. Seibert, collector as aforesaid; the said William Hager, Samuel Hitt, and Robert M. Snider, judges of the county court of Cape Girardeau county, Missouri, and Gabriel C. Pepper, county clerk as aforesaid, their agents, servants, and deputies, their successor or successors in office, they and each of them, be, and they are hereby, forever restrained and enjoined from collecting or attempting to collect the said two per cent. tax so as aforesaid levied by said county court of said county at its May term, 1883, for the payment of the judgment herein mentioned, and that the plaintiff have and recover of the defendants its costs in this behalf expended, and hereof have execution.

Respondent, in due time, filed his motion for a new trial or rehearing, which was overruled, and he has appealed said cause to the supreme court of Missouri, where it is now pending.

22 Respondent further states that he cannot, without violating said injunction of said circuit court of Cape Girardeau county, collect or attempt to collect said special tax, and for that reason and none other he has failed since said injunction was served on him to make any effort to collect said tax.

And for further return respondent states that he is ready and willing to do and perform any duty devolved on him as collector as aforesaid so far as he legally may, but submits whether he ought to be required to collect said special tax, because, as he is advised, the same was not levied in the mode and manner required by the laws of the State of Missouri, as set forth in sections 6798 and 6799 of the Revised Statutes of Missouri of 1879, concerning the assessment and collection of taxes, and it is made a criminal offense, punished by fine of not less than five hundred dollars and forfeiture of office, for any officer in the State of Missouri to collect or attempt to collect any tax or taxes other than those specified and enumerated in said section 6798 of said Revised Statutes without being ordered so to do by the circuit court of the county or the judge thereof in vacation, in the manner provided in said section 6799 of said Revised Statutes.

And respondent submits that said special tax is not a tax specified in said section 6798, and that no order was made by said circuit court of Cape Girardeau directing said county court to levy or assess said special tax, and he is advised by counsel that said levy of said special tax is void, and that he cannot collect or attempt to collect the same without violating the criminal law of Missouri and rendering himself liable to the pains and penalties prescribed.

23 Wherefore, having made full return herein, respondent prays to be hence discharged.

JAMES M. SEIBERT,
Collector.

Before the undersigned clerk of said court, in person, came the above-named James M. Seibert, who, being by me duly sworn, says that the statements contained in the foregoing return are true.

JAMES M. SEIBERT.

Sworn to and subscribed before this 3rd day of November, 1884.

A. P. SELBY, *Clerk.*

And afterwards, to wit, on the 6th day of November, A. D. 1884, the following further proceedings were had in said cause, and appear of record in the words and figures following, to wit:

Demurrer to Return of Respondent to Alternative Mandamus Filed.

UNITED STATES *ex rel.* GEORGE W. HARSHMAN, Relator,
vs.
JAMES M. SIEBERT, Collector, &c., Respondent. } 1766.

Now comes the relator by attorney and files demurrer to the return of respondent to the alternative writ of mandamus herein.

Judgment on Demurrer.

And the court having considered said demurrer to return finds the law thereon for the relator, and thereupon it is ordered that said

demurrer be, and the same is hereby, sustained, and, on mo-
24 tion of said relator by attorney, it is ordered that a peremptory writ of mandamus issue herein to be directed to the said respondent, James M. Seibert, collector of Cape Girardeau county, Missouri, commanding him to forthwith make collection of the tax heretofore levied by the county court of said county to pay the judgment heretofore rendered in favor of said relator and against said county, with interest thereon and costs, in the manner prescribed by law for the payment of said judgment, interest and costs; that as soon as said taxes shall have been so collected he shall report the same according to law, and that he certify perfect obedience to said writ to this court on the first day of the next term thereof, on the third Monday, the 16th day of March next.

Said demurrer is in the words and figures following, to wit:

Demurrer.

UNITED STATES, on the relation of GEORGE W. HARSHMAN,
vs.
JAMES M. SEIBERT, Collector of Cape Girardeau County, Mo.

And now comes the relator and demurs to the return of the collector in this case for the reason that said return does not set forth any facts to justify said collector in not proceeding to collect said tax according to law.

FISHER & ROWELL,
Att'ys for Relator.

25 And afterwards, to wit, on the seventh day of November, A. D. 1884, the following further proceedings were had in said cause and appear of record in the words and figures following, to wit:

Writ of Error Allowed. Citation Signed. Bond Approved. Supersedeas Awarded.

UNITED STATES *ex rel.* GEORGE W. HARSHMAN, Relator,
vs.
JAMES M. SEIBERT, Collector of Cape Girardeau County, Missouri, Respondent. } 1766.

Now comes the respondent, by attorney, and presents to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation citing and admonishing the said relator to be and appear at said Supreme Court at the next term thereof, on the second Monday of October next, which said writ of error is allowed and said citation signed by the judge.

And the said respondent also presents to the court his bond in the penal sum of five hundred dollars, which bond is approved and ordered to be filed. And on motion of said attorney it is ordered that a supersedeas be awarded staying further proceedings on the mandamus herein.

Said bond is in the words and figures following, to wit:

26 Know all men by these presents that we, James M. Seibert, as principal, and Leon. J. Albert and W. B. Wilson, as sureties, are held and firmly bound unto George W. Harshman, relator, in the full and just sum of five hundred dollars, to be paid to the said relator, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this sixth day of November, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately, at the September term, 1884, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between the United States *ex rel.* George W. Harshman, relator, and James M. Seibert, collector of Cape Girardeau county, Missouri, respondent, judgment was rendered against the said respondent, and the said respondent having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said relator citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said respondent shall prosecute said writ to effect and answer all damages and costs if — fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

(Signed)	JAMES M. SEIBERT.	[SEAL.]
"	LEON J. ALBERT.	[SEAL.]
"	W. B. WILSON.	[SEAL.]

Approved by—
SAMUEL TREAT, *Judge.*

[Endorsed:] No. 1766. United States circuit court, eastern district of Missouri. U. S. *ex rel.* Geo. W. Harshman *vs.* Jas. M. Seibert, collector. Bond, $500. —— ——, principal; —— ——, sureties. Filed 7th day of Nov., 1884. A. P. Selby, clerk.

27 UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record, pleadings, and proceedings had in case No. 1766 of United States *ex rel.* George W. Harshman, relator, against James M. Seibert, collector of Cape Girardeau county, Missouri, respondent, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district,

this 18th day of September, in the year of our Lord eighteen hundred and eighty-five.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk of Said Court,
By —— ——, *Deputy.*

28 [Endorsed] No. 1766. United States circuit court, eastern district of Missouri. United States *ex rel.* George W. Harshman against James M. Seibert, collector of Cape Girardeau county, Missouri. Duly-certified transcript in the above-entitled cause.

Endorsed on cover: E. Missouri C. C. U. S. No. 1103. James M. Seibert, collector of Cape Girardeau county, Missouri, plaintiff in error, *vs.* the United States *ex rel.* George W. Harshman. Filed October 16, 1885.

this 18th day of September, in the year of our Lord eighteen hundred and eighty-five.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk of Said Court,
By —— ——, *Deputy.*

28 [Endorsed] No. 1766. United States circuit court, eastern district of Missouri. United States *ex rel.* George W. Harshman against James M. Seibert, collector of Cape Girardeau county, Missouri. Duly-certified transcript in the above-entitled cause.

Endorsed on cover: E. Missouri C. C. U. S. No. 1103. James M. Seibert, collector of Cape Girardeau county, Missouri, plaintiff in error, *vs.* the United States *ex rel.* George W. Harshman. Filed October 16, 1885.

Supreme Court of the United States.

OCTOBER TERM, 1888.

JAMES M. SEIBERT, Collector of Cape Girardeau County, Missouri,
Plaintiff in Error,

vs.

UNITED STATES, *ex rel.* GEORGE W. HARSHMAN,
Defendant in Error.

No. 130.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

Brief for Plaintiff in Error.

ELLIS, JOHNS & McKNIGHT,
Attorneys for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1888.

JAMES M. SEIBERT, Collector of Cape Girardeau County, Missouri, *Plaintiff in Error*, *vs.* UNITED STATES, *ex rel.* GEORGE W. HARSHMAN, *Defendant in Error.*	No. 130.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

In 1869 the County Court of Cape Girardeau County, Missouri, caused to be issued $150,000 in bonds, bearing interest coupons, pursuant to the subscription of Cape Girardeau Township to the Cape Girardeau and State Line Railroad Company, under an Act of the General Assembly of Missouri approved March 23, 1868 (Record, pp. 15, 19)—(which provided that, for the payment of such bonds and interest, special taxes should be levied and collected "in the same manner as county taxes," "on all the real estate lying within the Township").

On February 16, 1882, the relator recovered judgment against said County, in the Circuit Court of the United

States, on certain coupons detached from said bonds, for $4,391.24, and costs $87.70, bearing interest at 6 per centum (pp. 5, 8, 11, 12). The County having failed to pay said judgment, on September 25, 1882, and May 4, 1883, alternative and peremptory writs of mandamus issued from said Circuit Court, commanding the County Court of said County to levy a special tax for its payment "on all property in said Township made taxable by law" (p. 5).

At their May 1883 term, said County Court, for the purpose of paying the judgments of George W. Harshman (the relator), Valentine Winter, John T. Hill, Ninth National Bank of New York, and Elisha Foote, levied a special tax of 2 per centum "on all the real estate and personal property in Cape Girardeau Township subject to taxation, including statements of merchants and manufacturers doing business in said Township," and made return thereof to said Circuit Court on September 13, 1883 (pp. 8, 12, 14, 19).

Thereupon the tax books, with the said special tax property extended, were delivered to the authorized collector, James M. Seibert, the plaintiff-in-error, who was proceeding to collect said tax, when on December 29, 1880, a temporary writ of injunction was served on him, on the petition of the Prosecuting Attorney of said County, alleging that said levy of said special tax was illegal, because it had not been made upon real estate only, and because "said County Court, before making the levy and order as aforesaid, did not make or cause to be made an application to the Circuit Court of said County, nor to the Judge thereof in vacation, for an order to have assessed, levied, and collected said 2 per cent. tax, nor was any such order in fact made by such Court or the Judge thereof in vacation," as required by law. Said injunction was made perpetual on September 1, 1884 (pp. 6, 8, 12, 13, 16–22).

Seibert having thereupon discontinued the collection of said tax, an alternative writ of mandamus issued to him on October 11, 1884, from the Circuit Court of the United States (pp. 4, 7), to which he made return November 3, 1884, setting forth the facts aforesaid, and justifying his refusal to collect because of said injunction, and because, as he was advised and believed, said special tax was illegally levied, in that it was levied on the personal property of the Township, and in that it was levied without the order of the Circuit Court of said County or the Judge thereof, as required by Sections 6798 and 6799, Revised Statutes of Missouri, 1879 (pp. 11–23).

To this return the relator demurred (p. 24) for the reason that said return does not set forth any facts to justify said collector in not proceeding to collect said tax according to law.

The Circuit Court sustained the demurrer, and ordered the issue of a peremptory mandamus against Seibert, commanding him to forthwith collect said tax, etc. (p. 23), wherefore Seibert sues out a Writ of Error to this Court (p. 25).

Errors Assigned.

The errors assigned, so far as now relied on, are that the court erred in sustaining the demurrer and the objections stated therein to the return of James M. Seibert to the alternative writ of mandamus, and in not discharging the respondent.

Reconsideration Requested.

Of the two points involved in this case, the first, namely, whether the County Court could lawfully levy the special tax upon personal property in the Township, is not pressed, in view of the decision in Cape Girar-

deau County Court *v.* Hill (118 U. S., 68), which was rendered after this writ of error was sued out.

The second point, namely, whether the County Court could lawfully levy the special tax without the order of the Circuit Court of the County, or the judge thereof, as required by the amending Act of 1879, was decided adversely to the contention of the plaintiff-in-error in Seibert *v.* Lewis (122 U. S., 284), on the ground that said amending act impaired the obligation of the relator's contract. Reconsideration of said decision in the case at bar is respectfully asked for the following reasons:

1. Because the opinion of the Court in said case states (p. 295): "It is therefore not denied in argument in the present case that Section 2 of the Act of March 23, 1868, under which the municipal obligations of the relator which had passed into judgment were issued, constitutes a part of the contract to the benefit of which he is entitled"; whereas, as matter of fact, such denial was explicitly, though briefly, made in argument under (Par. 3, p. 7, and Par. 3, 4, and 5, p. 9, of Brief), in respect of that part of said section which refers to the "manner" of collecting the tax.

2. Because said opinion refers (p. 295) to "the municipal obligations of the relator, which had passed into judgment"; and (p. 299) to "those (laws) in force in 1871, when the judgment of the Circuit Court was rendered;" and it states (p. 300): "The laws of Missouri, for the collection of the tax necessary to pay his judgment, in force at the time when it was rendered, continue to be and are still in force for that purpose . . . . When he seeks and obtains the writ of mandamus from the Circuit Court of the United States, for the purpose of levying a tax for the payment of a judgment which it has rendered in his favor, he asks and obtains only

the enforcement of the laws of Missouri under which his rights became vested"; wherefrom it appears that the opinion proceeded on the assumption that the relator had obtained judgment prior to the Act of March 8, 1879 (R. S. 1879, Sec. 6798, *et seq.*), and thereby acquired a vested right to the "manner" of levying special taxes then existing; whereas, as matter of fact, the law in force when the judgment was rendered, both in that case and in the case at bar, was said Act of March 8, 1879, which had changed the so-called manner of levying special taxes,—(See Certificate of Clerk of Circuit Court herewith filed; Elisha Foote's judgment)—and, under the rule as above stated, the decision should accordingly have been for the plaintiff-in-error.

3. Because said opinion declares that the provisions of the amending Act of 1879 "can not fail seriously to embarrass, hinder, and delay him (the relator) in the collection of his debt, and which make an express and injurious discrimination against him"; and this without giving any reason for said declaration other than the change in the remedy, and without any such reason, or showing of embarrassment, hindrance, injury, or other impairment by the defendant-in-error, but only his bald assertion to that effect, ignoring the opinion of the Supreme Court of Missouri (State *v.* Seibert, 91 Mo., 452) to the contrary; wherefrom it would appear that the obstruction of the rights of the relator was deduced as a conclusion of law from the mere fact of a change in the remedy, and this against the settled rulings of this Court.

4. Because said opinion does not examine, and doubtless therefore the Court did not consider, any of the points in the brief of argument hereinafter following, with one exception, namely, the rule as to the alteration of the remedy, which, however, was not applied to the

facts of the case as it is in said brief—which is submitted in the hope of throwing additional light on the question.

5. Because, on the argument of said cause, the Court refused to hear two counsel for the plaintiff-in-error, though they asked to be heard, on the ground that the Court was not accustomed to hear more than two arguments; whereas only one counsel for plaintiff-in-error had been heard, in opening and in reply, but the two hours' time which is allotted to each side by Rule 22, to be apportioned between said two counsel "at their discretion," had not been exhausted, and counsel were not aware of any modification of said rule.

6. Because judgment in said cause was rendered on the 27th of May, 1886, the last day of the term, but the opinion of the Court was not then delivered, and counsel for plaintiff-in-error were unable to procure said opinion for some days after the close of said term; wherefore they were not advised of the reasons for said judgment, nor was it possible for them to move for a rehearing thereof in view of existing rulings.

7. Because, as matter of fact, the amount involved in Seibert *v.* Lewis was insufficient to give this Court jurisdiction,—though that fact was not then known to plaintiff-in-error's counsel—namely, judgment $2,370.72 + costs $176.79 = $2,547.51 + $310.30 (interest at 6 per cent. to May 14, 1884) = $2,857.81. (See Certificate of Clerk of Circuit Court herewith filed; costs in Elisha Foote).

As lending countenance to this request for reconsideration, the Court's attention is invited to the fact that in Harshman *v.* Bates County (92 U. S., 569), the Act of March 23, 1868, involved in Seibert *v.* Lewis and in the case at bar, was declared to be unconstitutional, apparently by a unanimous Court; and that said decision was

afterwards reconsidered and overruled in County of Cass *v.* Johnston (95 U. S., 360).

Brief of Argument.

When the bonds in question were issued, the law of the State of Missouri providing for their payment was Section 2, Act approved March 23, 1868 (Laws of 1868, p. 92),—an act authorizing subscriptions in aid of railroad construction and the issue of bonds therefor—as follows:

"Sec. 2. In order to meet the payments on account of the subscription to the stock, according to its terms, or to pay the interest and principal on any bond which may be issued on account of such subscription, the county court shall, from time to time, levy and cause to be collected, in the same manner as county taxes, a special tax, which shall be levied on all the real estate lying within the township making the subscription, in accordance with the valuation then last made by the county assessor for county purposes."

When the relator recovered his judgment, and instituted these mandamus proceedings for its satisfaction, the amending Act approved March 8, 1879 (Laws of 1879, p. 185; Rev. Stat's, 1879, Sec's 6798–6800), had been added to the statute-books, as follows:

"Sec. 6798. *Taxes, how assessed, levied, and collected.*—The following-named taxes shall hereafter be assessed, levied, and collected in the several counties in this State, and only in the manner and not to exceed the rates prescribed by the constitution and laws of this State, viz: The State tax, and the tax necessary to pay the funded or bonded debt of the State, the tax for current county expenditures, and for schools.

"Sec. 6799. *Procedure, limitations, and conditions.*—No other tax for any purpose shall be assessed, levied, or collected, except under the following limitations and conditions, viz: The prosecuting attorney or county attorney of any county—upon the request of the county court of such county, which request shall be of record with the proceedings of said court, and such court being first satisfied that there exists a necessity for the assessment, levy, and collection of other taxes than those enumerated and specified in the preceding section—shall present a petition to the circuit court of the county, or to the judge thereof in vacation, setting forth the facts and specifying the reasons why such other tax or taxes should be assessed, levied, and collected; and such circuit court, or judge thereof, upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy, and collection thereof will not be in conflict with the constitution and laws of this State, shall make an order directed to the county court of such county, commanding such court to have assessed,

levied, and collected such other tax or taxes, and shall enforce such order by mandamus or otherwise.

"SEC. 6800. *Assessment, levy, and collection not to be made except as provided*"—(making a violation of the foregoing sections a misdemeanor, punishable by fine and loss of office).

The question now before this Court is, whether the "levy" of the special tax by the County Court, without compliance with said Act of 1879, was a legal levy.

It was urged below by the relator that such levy was legal, because said Act of 1879 was unconstitutional in respect to his bonds, for the reason that it impaired the obligation of the contract, as to the "manner" of levying the tax for their payment, created by the Act of 1868, to the benefit of which he was entitled; and such was the opinion of this Court in Seibert *v.* Lewis (*supra*). But it is respectfully submitted that such is not the law, for the reasons hereinafter stated.

First.

The provision in the Act of 1868, authorizing the County Court to levy and collect special taxes "in the same manner as county taxes," so far as it entered into this contract, created an obligation to the benefit of which the makers of the bonds (and not their holders) were entitled; hence one which might be waived by them or on their behalf, and any impairment of which the holders can not be heard to set up.

1. The General Railroad Law of Missouri (Gen. Stat., 1865, p. 338; Wagner's Stat., p. 305) had provided for subscriptions to railroads by Counties, the issue of bonds, their payment by taxes, etc., and the Act of 1868 was designed to extend its benefits to the Townships, which then had no separate corporate existence (92 U. S., 573). It was known as "The Township Aid Act" (92 U. S., 572; 95 U. S., 365). But whilst the Township made the subscription, the County issued the

bonds, and for their payment the County authorities levied the tax on the Township property. Wherefore, to prevent irregularity in the mode of taxation—whether from ignorance, malice, or venality—and consequent vexation and hardship to the Township taxpayers, the phrase "in the same manner as county taxes" was inserted. There appears to be no other reasonable explanation of its purpose. The railroad corporations, or the bondholders, might have been benefited by a provision fixing the *time* of collecting the tax (which, however, was not fixed), but it is impossible to discern any interest which they could have at that time had in fixing the *manner* of collecting it. On the other hand, it is clear that a provision for its collection in the regular manner provided by law for collecting the county taxes was of the highest importance to the people.

2. The benefit of the provision may therefore be waived by or for the makers of the bonds.

Shutte *v.* Thompson (15 Wall., 151, 159): "A party may waive any provision, either of a contract or of a statute, intended for his benefit."

Bailey *v.* Magwire (22 Wall., 215, 230): "Certainly no one will contend that a State can not waive at any time a provision for its own benefit."

3. The relator can not be heard to allege impairment of his contract by a change in this provision, because it was not intended to impose an obligation on the makers of the bonds for his benefit.

Dartmouth College *v.* Woodward (4 Wheat., 656): "What is a contract? It may be defined to be a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other."

Ibid., 628: "The State Legislatures were forbidden 'to pass any law impairing the obligation of contracts,' that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself."

4. It is a contract right to which the Constitution refers, that is, a right arising from an agreement or consensus of the contracting parties, and therefore a right which was present, actually or by implication, in

the minds of the parties at date of the contract. Supposing it to be true, then,—though its truth is denied—that there is a present special benefit to the relator in having the levy of these taxes made in the same manner as county taxes, this alone does not imply a right thereto, or an obligation under it, within the meaning of the constitutional inhibition; it must also appear that he was entitled to it at date of the contract, and such, as has been shown, was not the case.

5. A case in point is Railroad Co. *v.* Falconer (103 U. S., 821, 826), wherein it was urged for the Railroad Company that a provision in a similar "Railroad Aid Act" of the State of New York, by which certain town commissioners were "empowered and directed to subscribe," etc., constituted an obligation to whose benefit the Company was entitled, which was impaired by a subsequent law of the State. But this Court answered: Nay. The obligation was due to the town which appointed them, and not to the Railroad Company.

So in Barkley *v.* Levee Commissioners (93 U. S., 258, 265), much reliance was placed by the petitioner for mandamus on the fact that the law, under which his contract arose, made the taxes for his payment a first lien on the property liable thereto, and the benefit of which he accordingly claimed; but this Court replied: Nay. The lien is for the benefit of the public authorities, and not for that of the public creditors.

So in Bailey *v.* Magwire (22 Wall., 215, 230), where it was urged that the State of Missouri was bound by a law in force at date of the contract, fixing the mode of ascertaining the valuation of certain taxable property, and whose maintenance was for the benefit of the Railroad Company, this Court held that it was plainly intended for the public benefit, "and if, on trial, it should turn out not to be the best mode for the purpose,

surely the Legislature has a right to change it and adopt another."

Second.

If, however, the bondholders are entitled to the benefit of the said provision, nevertheless it related to the manner of collecting the tax, and not to the manner of levying it.

1. The Act of 1868, as is apparent from its terms, was intended to conform to the General Railroad Law (Gen. Stat., 1865, Sec. 18, p. 338; Wagner's Stat., p. 305), which provided for the "levy" of taxes, without any reference to the "manner" of levying. The two acts are *in pari materia.*

2. A similar purpose to conform only the manner of *collecting* taxes to that of the county taxes appears in the Act of Missouri approved March 21, 1870 (Wagner's Stat., p. 1265). Sec. 9 authorized the city Boards of Education to levy a school tax by certifying it to the Clerk of the County Court, who should extend the taxes on the school tax book and deliver it to the collector, "whose duty it shall be to collect such taxes in the same manner that he is required to collect State and county taxes."

3. When the Legislature of Missouri have desired that the manner of levying special taxes, as well as of their collection, should be the same as that for the levy and collection of county taxes, they have been careful to so particularly state; for example, in Chap. 52, Gen. Stat. 1865:

"SEC. 6. For the purpose of opening and keeping in repair roads, . . . the county courts are hereby empowered and authorized to levy a special tax, . . . said levy to be made at the time and in the same manner as the county revenue is now levied, . . . and the collection thereof to be made and enforced in the same way and manner as the State and county revenue is now or hereafter may be by law directed to be made and enforced."

4. Statutes of the States are to be construed by the rules of the common law (1 Black, 358, 375), under which ruling the phrase "in the same manner as county taxes" refers only to the word "collected."

Finch's Discourse of Law, B'k 1, Chap. 3: "Words of construction must be referred to the next antecedent where the matter itself doth not hinder."

R'y Co. *v.* Marriage, 9 House of Lords, 37: "It is an ordinary rule, not so much of law as of the grammatical construction of the English language, that words of relation *prima facie* refer to the nearest antecedent."

Broom's Legal Maxims, 680: "Relative words must ordinarily be referred to the next antecedent, where the intent upon the whole deed or instrument does not appear to the contrary, and where the matter itself does not hinder it."

5. The reason why the Legislature intended to refer to the manner of collecting only is plain, viz., no manner of levying county taxes was prescribed by law, saving that the County Court should make a written order imposing them; whereas the manner of collecting county taxes was most minutely pointed out in the General Statutes. Q. V.

Third.

If, however, the phrase "in the same manner as county taxes" relates to both levying and collecting, nevertheless there was no change in the manner of levying taxes made by the Act of 1879.

1. The Act of 1868 in this phrase obviously referred to the existing statutes relating to the levy of county taxes (Gen. Stat. 1865, p. 121; Wagner's Stat., p. 1193, Sec. 166, 167), which were as follows:

"SEC. 166. As soon as may be after the assessor's book of each county shall be corrected and adjusted, according to law, the county court shall ascertain the sum necessary to be raised for county purposes, and fix the rate of taxes on the several subjects of taxation, so as to raise the required sum, and the same shall be entered in proper columns in the tax book.

"SEC. 167. Whenever the county court shall ascertain the amount to be raised for county purposes, and fix the rates of county taxes, they shall cause the same to be entered of record, so as to show the whole amount to be raised, and the proportion which the rates of the county tax bear to the rates of State tax on the same subject of taxation. . . ."

The same provisions are in existence now (Rev. Stat. 1879, Sec's 6805, 6806). Consequently when the County Court follow the directions therein contained, they make the levy in the exact manner contemplated by the Act of 1868.

2. The manner of levying taxes so far as prescribed in said statutes, is plain, and the following is the whole of it: After the County Court ascertain the sum necessary, they fix the rates and cause the same to be entered of record. There are two things referred to, ascertaining the amount and making the levy. Fixing the rates and recording them, or issuing an order, constitutes the act of levying. Ascertaining the amount is no part of the act of levying, and consequently no part of the manner of levying. "Manner" is from *manus*, and means the mode of handling, execution, or action.

3. Town of Queensburg *v.* Culver (19 Wall., 83, 93): Sec. 4 of an act authorizing subscriptions to a railroad, the issue of bonds therefor, and the levy of taxes to pay them, provided that certain Commissioners should annually report the amount of taxes required to the Supervisors, who should assess, levy, and collect them "in the same manner as other taxes are assessed, levied, and collected." Here, the Supervisors, after ascertaining the necessary amount from the report of the Commissioners, made the levy. This Court, in its opinion, distinguished the ascertainment from the levy.

4. City of Kansas *v.* R'y Company (81 Mo., 285): The statute (1873) provided that the city council should fix the rate of taxation, certify it to the County Court, "and the County Court shall immediately ascertain and levy the taxes"—explicitly distinguishing "ascertain" from "levy." The court, after ruling that the levy was neither fixing the rate, nor certifying it, nor assess-

ing the tax, nor listing and valuing the property by the assessor and his return, said (p. 294):

"The levy is made by an order in writing, by the person or tribunal authorized to make it, imposing the tax upon the property which has been regularly assessed as taxable property."

5. It is manifest that only the manner of ascertaining the special tax (and not the manner of levying it) is changed by the Act of 1979. Sec. 1 (Sec. 6978 R. S.) provides that the "manner" above referred to shall be followed in levying *county* taxes. The Act of 1868 provides that the same manner shall be followed in levying *special* taxes, and the record (p. 17) shows that the County Court followed it in this instance. But Sec. 2 of the Act of 1879 (R. S. 6799) provides that the County Court shall levy a special tax only after "ascertaining" it from the order of the Circuit Court of the County or the Judge thereof. That is, the change concerns something wholly anterior to, and disconnected from, the act of levying the tax.

6. In the injunction proceedings in the case at bar, the petition sets out (Record, p. 14), and the finding was (*Ibid.*, p. 20), "that said County Court, *before making the levy* and order as aforesaid, did not" apply to the Circuit Judge, etc. This conforms to the statute exactly. When the Act of 1868 was passed, the County Court alone was empowered to levy taxes (Rev. Stat. 1865, p. 121, Sec. 76; Wagner's Stat., p. 1193, Sec. 165), and so it remains under the revision of 1879. Sec. 6799 provides that the Circuit Judge, after being satisfied of the constitutionality and legality of the tax, "shall make an order directed to the County Court of such county, commanding *such Court* to have assessed, levied, and collected such other tax." It would seem to be beyond question that the purpose of the Legislature was that the levy should be made *by the County Court*

alone, and, under the Act of 1868, "in the same manner as county taxes."

7. The substance of the change, then, is that the County Court must take the advice and order of the Circuit Judge before making the levy. But there was no contract between the parties on this subject, and hence no impairment of their contract by the change. The order of the Circuit Judge was, however, a condition precedent to the levy, "upon a compliance with which the *power* to levy the tax depended" (State *v.* R'y Co., 87 Mo., 236), and for want of which the levy was illegal and void (*Ibid.*; State *v.* Hager, 91 Mo., 452—the injunction proceeding in this case). These decisions are "controlling" (22 Wall., 231).

Fourth.

If, however, the Act of 1879 changed the manner of levying the tax, nevertheless it also made the order of the Circuit Judge a condition precedent to a lawful assessment of the tax; as there was no stipulation in the relator's contract regarding the manner of assessment, it was not impaired thereby; and the collector was justified in refusing to collect a tax illegally assessed.

1. Hitherto, both in the case at bar in the court below and in Seibert *v.* Lewis (*supra*) in this Court, the impairment of the contracts of the relators has been rested solely on the express language of the Act of 1868, which provides only that the County Court "shall *levy* and cause *to be collected*, in the same manner as county taxes, a special tax." But Sec. 2 of the Act of 1879 (Sec. 6799 R. S.) declares: "No other tax for any purpose shall be *assessed*, levied, or collected, except under the following limitations and conditions," etc.

2. Assessment is no part of the levy, either generally or by the laws of Missouri.

City of Kansas *v.* R'y Co. (81 Mo., 285, 294): "Assessment for taxation is one step, but levying the tax is another and different step. . . . The act of the assessor in listing and valuing the property, with the return of the same to the tribunal empowered to levy the tax, does not constitute a levy of taxes."

3. In the absence of an express contract, the State may change the manner of assessing taxes, and such change does not violate the constitutional inhibition against laws impairing the obligation of contracts.

Bailey *v.* Magwire (22 Wall., 215, 229): "And the claim is that the State Legislature is prohibited from passing any law to *assess* the property of the Company for State purposes *in a different manner*. It is not so written in the statute, nor, indeed, can any proper inference be drawn from what is written that the Legislature intended to contract with the Company in this particular. It would be strange, indeed, if it were so; for the mode of assessment might not work well, and yet, if it formed the subject of a contract, it could not be changed."

4. The absence of the order of the Circuit Judge invalidated the assessment (87 Mo., 236; 91 Mo., 452), the law expressly forbade the plaintiff-in-error to collect the tax, and mandamus will not lie to compel its collection.

U. S. *v.* County of Macon (99 U. S., 582, 591): "The judgment has the effect of a judicial determination of the validity of his (the relator's) demand, and of the amount that is due, but it gives him no new rights in respect to the means of payment."

U. S. *v.* County of Clark (95 U. S., 769, 773): "No court will by mandamus compel county officers of a State to do what they are not authorized to do by the laws of the State."

Fifth.

Again, however, if the levy of the special tax "in the same manner as county taxes" was a part of the contract to the benefit of which the relator was entitled, nevertheless there was in fact no impairment of the obligation by the alteration made by the Act of 1879.

1. The unconstitutionality of a State law for this cause must be demonstrated, and is not to be presumed;

on the contrary, the presumption must be that the law is constitutional.

Cooper *v.* Telfair (4 Dall., 14, 18): "The presumption, indeed, must always be in favor of the validity of laws, if the contrary is not clearly demonstrated."

Fletcher *v.* Peck (6 Cranch, 87, 128): "It is not on slight or vague conjecture that the Legislature is to be pronounced to have transcended its power, and its acts to be considered as void."

Munn *v.* Illinois (94 U. S., 113, 132): "For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did."

2. The invalidity of the law can not be argued from the mere fact of a change in the remedy, because the settled rule is that the remedy, existing at date of the contract and entering into it, may be changed at the discretion of the Legislature, provided there be no impairment of the obligation; and the test of impairment is that there is a "denial or obstruction" of the right secured by the contract.

Sturgess *v.* Crowninshield (4 Wheat., 122, 200): "Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation may direct."

Bronson *v.* Kinzie (1 How., 311, 316): "Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract."

Memphis *v.* United States (97 U. S., 293, 295): "The Legislature of a State can not take them (existing remedies) away without impairing the obligation of the contract, though it may modify them, and even substitute others, if a sufficient remedy be left, or another sufficient one be provided."

McCracken *v.* Hayward (2 How., 608, 612): "Any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

3. No one has thus far asserted in this Court that the Act of 1879 amounts to a total "denial" of the relator's remedy. This Court in Seibert *v.* Lewis (*supra*) went no further than to hold that it would "embarrass, hinder, and delay" him. And, indeed, the certainty of equal ultimate relief is assured; for the judgment is conclusive of the validity of the bonds (The Mayor *v.* Lord, 9 Wall., 409) and of the coupons (Ralls County

Court *v.* United States, 105 U. S., 733), and the Supreme Court of the State has declared it to be binding on the courts and officers of the State (State *v.* Rainey, 74 Mo., 229); a single writ of mandamus may issue at once to the County Court, the county attorney, and the Circuit Judge (Labette *v.* Moulton, 112 U. S., 217, 224), or to each in his turn (Rees *v.* City of Watertown, 19 Wall., 107, 117); such writ may properly run to the Circuit Judge, who is *quoad hoc* merely a part of the taxing machinery, to issue the order; or, if not, at least to take action; in either event, by such writ and by the judgment, it is obvious, the Circuit Judge will in fact be "satisfied of the necessity for such other tax" (Sec. 6799, R. S.), and will issue the order to the County Court; for it is to be presumed, as matter of law, that each of the officials concerned will do his duty in the premises.

In Lower *v.* U. S. (91 U.S., 536) mandamus ran to town auditors to audit a judgment preparatory to levying the tax. *Ex Parte* Rowland (104 U. S., 604, 613) ruled that mandamus would lie against a Judge of Probate *ex officio* President of a Court of County Commissioners. Hoff *v.* Jasper County (110 U. S., 53) ruled that the certificate of the Auditor of the State to the propriety of issuing certain county bonds was not a judicial act, but like a similar act of the County Court.

C. & A. R'y Co. *v.* Wiggins (108 U. S., 18, 24): "The presumption in all cases is that the courts of the States will do what the Constitution and laws of the United States require." Hoff *v.* Jasper County (110 U. S., 53, 56): "It is always to be presumed that a public officer will do, whenever called on, what the law requires of him." Spring Valley Water Works *v.* Schottler (110 U. S., 347, 354): This Court overruled the argument pressed on them, to the effect that certain officers would not do their duty.

4. That there is no such "obstruction" of the relator's rights as will impair his contract is clear from the following considerations. The whole change effected by the Act of 1879 is in requiring the County Court not to make the levy without the order of the Circuit Judge, whereas the County Court formerly levied the tax of their own power. Now, the only way in which obstruction could result would be either from a contumacious delay of the Circuit Judge, or from the necessary delay

caused by the submission of the question to him. As to the former, it has already been shown that it must be presumed that the Circuit Judge will do his duty, which, in this instance, is plain; and, further, it may not be concluded, as matter of law, that a contingency which may never occur will impair the obligation of a contract (Conn. Ins. Co. *v.* Cushman, 108 U. S., 51, 66). As to the latter, since the action of the Circuit Judge upon mandamus proceedings will be purely formal, the time consumed must be of the briefest; and, whatever the rule may have originally been (Green *v.* Biddle, 8 Wheat., 1, 84), it is now settled that, so long as a remedy is not denied, the difficulty and time of enforcing it may be increased, provided there results no serious embarrassment, rendering the remedy hardly worth the pursuing, that is, practically useless.

Bronson *v.* Kinzie (1 How., 311, 315, 317): "Although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. . . . It is manifest that the obligation of the contract . . . may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing, . . . conditions that rendered it useless, or impracticable to pursue it."

Curtis *v.* Whitney (13 Wall., 68, 70): "Nor is it (the new restriction) difficult to comply with . . . . Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now, in making a large class of contracts, that they may be affected in many ways by State and national legislation."

Terry *v.* Anderson (95 U. S., 628, 633): "The parties to a contract . . . have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced."

Louisiana *v.* New Orleans (102 U. S., 203, 207): "Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the contract is to that extent weakened." (The case shows that a very serious postponement was in the mind of the learned Justice).

Vial *v.* Penniman (103 U. S., 714, 720): "The general doctrine of this Court on this subject may be thus stated: In modes of proceeding, or forms to enforce the contract, the Legislature has the control, and may enlarge, limit, or alter them, provided it does not deny a remedy, or so embarrass it with conditions or restrictions as seriously to impair the value of the right." (Cases cited.)

5. A remedy is properly divisible into form and sub-

stance, and the rule is that, to impair the obligation of the contract, the alteration must affect the substance of the remedy.

The new law must not take away "all adequate and efficacious remedy" (Louisiana *v.* Mayor of N. O., 109 U. S., 289; Nelson *v.* St. Martin's Parish, 111 U. S., 721); it must not "materially" impair the right (Green *v.* Biddle, 8 Wheat., 17; Ochiltree *v.* County Court, 21 Wall., 252; Edwards *v.* Kearzey, 96 U. S., 601); it must not deprive the party of any "substantial" right secured by the contract (Von Hoffman *v.* City of Quincey, 4 Wall., 553; Clark *v.* Reyburn, 8 Wall., 322; Butz *v.* City of Muscatine, 8 Wall., 583; Gunn *v.* Barry, 15 Wall., 623; Walker *v.* Whitehead, 16 Wall., 318; Edwards *v.* Kearzey, 96 U. S., 607).

6. By the Act of 1879, two additional officers (the County Attorney and the Circuit Judge) are made part of the taxing machinery, which is a mere change in form, and clearly a change within the competency of the State to make. (The possible brief delay in action has been discussed above.)

Thompson *v.* Allen County (115 U. S., 550, 555): "The power to direct a tax to be levied in the highest act of sovereignty, and is exercised by Legislative authority only."

Meriwether *v.* Garrett (102 U. S., 472, 515): "(The State) having sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced. . . . No Federal Court, either on its law or equity side, has any inherent jurisdiction to lay a tax for any purpose, or to enforce a tax already levied, except through the agencies provided by law."

7. What was the "substance" of the original remedy? That the "manner" of levying and collecting should be the same as in county taxes. If it be assumed, as the relator contends, that the freedom of the County Court from the control of any other tribunal is a part of the "manner," how is that view to be reconciled with the control which he desires the Circuit Court of the United States in this instance to exercise by its writ of mandamus? The mandamus and the "order" provided for in the Act of 1879 would have the same effect precisely in setting the County Court in action. On his own hypothesis, then, the relator himself is attempting to violate the contract. He is asking this

Court to sanction the doing by the Circuit Court of the very thing which he denies that the Legislature of the State can lawfully authorize the Circuit Judge to do. If he reply that the Circuit Judge may refuse to issue the order, the rejoinder (as shown above) is that (a) he may be compelled thereto by a mandamus, that (b) it must be presumed that he will do his duty, and that (c) a remote contingency is not good ground for holding the obligation of the contract to be impaired.

Sixth.

The object of the Act of 1879 was, as its terms show plainly, to facilitate the levy and collection of special taxes as the Constitution and laws provided; it was therefore beneficial, rather than injurious, to the relator, and consequently has not, in any just view of the case, impaired the obligation of his contract.

1. The motive of the Legislature in passing the law is ordinarily not to be regarded; it is to be presumed that circumstances warranted its passage.

Planters' Bank *v.* Sharp: (6 How., 301, 319): "Those public bodies must be presumed to act from public considerations, being in a high public trust; and when their measures . . . appear intended for improvements, made in the true spirit of the age, or for salutary reforms in abuses, the disposition of the judiciary should be strong to uphold them."

Antoni *v.* Greenhow (107 U. S., 769, 775): "We have nothing to do with the motives of the Legislature, if what they do is within the scope of their powers under the Constitution."

2. The presumption is borne out by the provisions of the statute itself; it remits the questions of the "necessity," "constitutionality," and "legality" of the special tax to a trained Judge, the Circuit Court of the County, instead of leaving it to the untrained County Court. In Missouri, special taxes are levied for a variety of purposes other than that of paying railroad bonds, and he questions arising upon them are often, as in the case at bar, delicate and difficult. For their proper solution,

they demand professional learning and independence of judgment, either to prevent fraud or mistake, or to withstand the frequent popular clamor against tax levies. Where can these be more surely obtained than among the judiciary? Does it lie in the mouth of the relator to say that he is injured by the substitution of a skilled for an unskilled mind to determine these questions? Is it for this Court to hold that such subsitution of that Court imperils his interests?

3. It is presumably impossible for the County Court to levy a special tax, or a tax of any kind, without deciding that it is constitutional, legal, and necessary; certainly it is their duty to determine these points before making the levy. If they act intelligently, they will seek competent legal advice. Hence, the sum total of the change effected by the Act of 1879 was to require them to take the advice of a particular person, elevated to the bench for his legal attainments. Surely the relator had no contract as to the person who should advise the County Court of their duty in reference to his judgment. Within the intention of the parties, such result must have been a mere incidental advantage, if an advantage at all, and "it was the object of the national Constitution to protect rights, and not mere incidental advantages which may affect the contract indirectly." (Ochiltree *v.* Railroad Company, 21 Wall., 249, 253.)

4. It need hardly be suggested that the fact that, in the case at bar, the Circuit Court of the County will have under consideration the mandamus of the Circuit Court of the United States, cuts no figure in determining the constitutional question involved. It is a mere accident that the question arises under these mandamus proceedings; it might have arisen in several other proceedings, or in mandamus proceedings in a court of the State;

it did arise in the suit for an injunction recited in the record, and might have come thence into this Court.

5. Furthermore, the mandamus of the Circuit Court of the United States is not conclusive of the legality and constitutionality of the tax (Stewart *v.* Jefferson Police Jury, 116 U. S., 135; Ralls County Court *v.* United States, 105 U. S., 733, 738; United States *v.* County of Macon, 99 U. S., 582). The tax-collector must decide these questions for himself, under the advice of his counsel, and uniformity and orderliness will undoubtedly follow the employment of the scheme provided in the Act of 1879. It has already been said, and it is plain, that the question of the "necessity" of the levy will be disposed of by the mandamus itself.

6. It belongs to the Legislatures "to determine what measures must be taken for the public welfare" in the matter of levying taxes (Meriwether *v.* Garrett, 102 U. S. 472, 515); "for such legislation demanded by the public good . . . there is no restraint in the Federal Constitution, so long as the obligation of performance remains in full force" (Curtis *v.* Whitney, 13 Wall., 68, 71); "in all such cases, the question is one of reasonableness, and . . . of that the Legislature is primarily the judge; we can not overrule the decision of that department of the government unless a palpable error has been committed" (Terry *v.* Anderson, 95 U. S., 628, 633).

7. It is a settled rule that, where the apparent purpose of the new law is to facilitate the just execution of the contract, it does not impair its obligation (Watson *v.* Mercer, 8 Pet., 88; White Water Co. *v.* Vallette, 21 How., 414; Ochiltree *v.* R. R. Co., 21 Wall., 249, 253; Randall *v.* Kreiger, 23 Wall., 137; Ewell *v.* Daggs, 108 U. S., 143.)

Seventh.

The following are cases in which either the facts or the principle involved, or both, are so closely allied to those in the case at bar, as, it is submitted, to be undistinguishable from it. In all of them new conditions and restrictions were attached to the exercise of the right secured by the contract, and in all but one the action of a new tribunal was made necessary to the exercise of such right. In all of them the amending act was held to not impair the obligation of the contract.

1. Hoff *v.* County of Jasper (110 U. S., 53) is substantially on all fours with the case at bar. The suit was on interest coupons of bonds issued by Jasper County, Mo., under the "Township Aid Act" of 1868. The Township had voted a subscription, which was ordered and made by the County Court, and accepted by the Railroad Company; after which the Legislature passed an amendatory law, requiring the registration of the bonds by the State Auditor and his certificate upon their face. It was urged that this new law violated the obligation of the contract of subscription.

Comparing said case and the case at bar, it appears that the new law declared that the bonds there should not be valid without the State Auditor's certificate, as it declared that the tax here should not be valid without the order of the Circuit Judge; that the object of the new law there was to prevent frauds and mistakes (Anthony *v.* Jasper County, 101 U. S., 693, 696), which is the manifest purpose of the new law here; that the consent of a new tribunal to the issue was required there, as it is necessary to the taxation here, whereas in both cases the County Court's action alone was requisite before the new laws; that the ordinary duty of the State Auditor there was judicial, as is that of the Circuit Judge here;

that the County Court must refer the question of the issue to the Auditor there, as it must refer the question of the tax to the Judge here; that some delay in the issue must occur there (*Ibid.*, 697), as some delay in the taxation must occur here; that the Auditor was to be satisfied of the legality of the issue there, as the Judge is to be satisfied of the legality of the tax here; that it was competent for the Auditor there to refuse the certificate, as it is competent for the Judge here to refuse the order; that the bonds were actually issued there without the Auditor's approval, as the tax was actually levied here without the Judge's approval; and that, in both cases, except for the new laws the issue and levy would have been legal.

In that case the various facts and possibilities as to the effect of the new law, above recited, were urged as reasons why the obligation of the contract was impaired; but this Court brushed them aside in a brief but cogent opinion, apparently unanimous, and sustained the constitutionality of the new law. It was said of the effect of the new law there: "There is nothing changed but the form of the execution" of the bonds, as, it is submitted, there is nothing changed here but the *form* of the execution or "manner" of taxing—there is no change of its *substance.*

2. Bailey *v.* Magwire (22 Wall., 215) concerned the manner of assessing taxes, and appears to be undistinguishable in principle from the case at bar. It involved, as one of its points (p. 229), the question whether "the State Legislature is prohibited from passing any law to assess the property of the Company in a different manner" from that prescribed in the law existing at date of the contract. This Court held that such new law could be passed, because the manner of assessment provided by both laws was for the public benefit, and

of right ought to be changed as the exigencies of the public interests required.

3. Curtis *v.* Whitney, (13 Wall., 68) was a case in which, after land had been purchased at a tax sale, under a law which entitled the purchaser to a deed in the event of no redemption within three years, a new law was enacted requiring him to serve written notice on any occupant of the land in order to become entitled to the deed. Here was a new "condition, limitation, or restriction" attached to the purchaser's contract, recognized by this Court as imposing some additional burden; but the law was sustained because it did not necessarily destroy the remedy, and because it was made *pro bono publico*.

4. Tennessee *v.* Sneed (96 U. S., 69) arose under a law taking away the remedy by mandamus existing at date of the contract, and substituting a different remedy, viz., a suit at law in a different tribunal, under which, it was obvious, the judgment might still have to be enforced by a mandamus. It was objected (p. 73) that the new law placed "impediments and obstructions" in the way of enforcement of the relator's contract right, and it was manifestly possible that delay in enforcing it might happen. The new law, which, it may be added, provided that the remedy should be "in no other manner," was sustained on the ground that it was for the public good, and was reasonably effective.

5. Louisiana *v.* New Orleans (102 U. S., 203) concerned a statute enacted after the contract right was acquired, taking away all summary process for the collection of taxes in satisfaction of the judgment, and requiring its registration, with certain formalities, as a condition precedent to its payment. The whole "manner" of satisfying the relator's judgment was changed, and the auditor or controller, a judicial officer,

was empowered to act on it prior to payment. Obviously he might have refused to act, to the delay and damage of the relator. The State court held the new law to be "a wise and useful provision, tending to restrain and check the reckless levy of taxes," and "made in the interest of economy and the orderly conduct of the city's affairs"; and this Court sustained the law, saying that if payment was not made under it "the relator can pursue further remedies for the collection of his judgments."

6. Antoni *v.* Greenhow (107 U. S., 769) was a case wherein, by virtue of the law existing at date of the issue of the bonds, the coupon-holder was entitled to pay taxes with said coupons, and his remedy to compel the collector to receive them was by mandamus. Afterwards a law was passed requiring a suit on the coupons, in a different tribunal, *as a condition precedent to the issue of the mandamus.* This Court, ruling (p. 774) that the remedy might be changed in any manner, provided it remained adequate and efficacious, and pointing out (p. 776) three changes in the old remedy made by the new law, held that the new remedy was nevertheless its substantial equivalent.

Eighth.

There are two opinions of the Circuit Court of the United States, which hold the Act of 1879 to be unconstitutional; but, it is submitted, they do so for reasons which have been amply refuted above.

1. United States *v.* Johnson County (5 Dill., 207) stated the rule to be (215) that "such (remedy) as existed at the time of entering into the contract can not be so changed as to make it *less valuable,*" and this in in opposition to the express language of this Court in

Curtis *v.* Whitney (*supra*). It then argued (216) that, as the Supreme Court of Missouri had held these bonds invalid, the Circuit Judge would necessarily "refuse to make the order for the levying of the tax;" and this contrary to the express and implied rulings of this Court in a number of cases (*supra*) to the effect that such a presumption or contingency must not be regarded. It then declared (216) that the effect would be that the judgment of a Circuit Court of the United States could be declared invalid by the Circuit Judge of a county; and this in contravention of the decision of the Supreme Court of Missouri in State *v.* Rainey (*supra*). And on these grounds, it held (218) the Act of 1879 void as to bonds issued prior to its date.

2. United States *v.* Lincoln County (5 Dill., 184) held to the same effect, but for somewhat different reasons. It ruled (204) that the Act of 1879 "has undertaken to convert the duty of levying such taxes from a ministerial to a judicial duty"; and this in antagonism to the rulings of this Court that a judicial officer is acting ministerially when acting as part of the tax-levying machinery (*supra*), and in disregard of the fact that if the duty of the Circuit Judge be judicial, nevertheless mandamus will lie to command him to act, and under the decision in State *v.* Rainey (*supra*) his action must be in favor of the validity of the tax. It then argued that the Circuit Judge might refuse to do do his duty in the premises, ignoring the repeated rulings of this Court (*supra*) that such presumptions may not be indulged in, or contingencies regarded. It then reverted (206) to the mistaken view that the Circuit Judge is a judicial officer as to the "order" (though he undoubtedly is in enforcing it by mandamus, as he is authorized by the Act, Sec. 6799). It finally (207) held the Act of 1879 void as to earlier issues, "if intended to apply to the judgments of

this court," thereby putting a new, and, it is believed, incorrect interpretation upon the constitutional inhibition.

Ninth.

The foregoing discussion, it is submitted, demonstrates the constitutionality of the Act of 1879; but if not, nevertheless, in view of it, the demonstration of its unconstitutionality would appear to be impossible; and the rule is that, unless the unconstitutionality be clear, this Court will sustain the law.

Cooper *v.* Telfair (4 Dall., 14, 19): "To authorize this Court to pronounce any law void, it must be a clear and unequivocal breach of the Constitution, not a doubtful and argumentative application."

Fletcher *v.* Peck (6 Cr., 87, 128): "The question, whether a law be void for repugnancy to the Constitution, is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. . . . It is not on slight implication or vague conjecture that the Legislature is to be pronounced to have transcended its powers."

Dartmouth College *v.* Woodward (4 Wheat., 518, 625): "On more than one occasion, this Court has expressed the cautious circumspection with which it approaches the consideration of such questions, and has declared that in no doubtful case would it pronounce a legislative act to be contrary to the Constitution."

Butler *v.* Pennsylvania (10 How., 402, 415): "It has been repeatedly said by this Court . . . that the law of one of the States should never be so denominated (unconstitutional), if it can on any other principle be correctly explained. . . . The extreme of such an abuse would appear to exist in the arraignment of their control over officers and subordinates in the regulation of their internal and exclusive polity, and over the modes and extent in which that polity should be varied to meet the exigencies of their peculiar condition."

Township of Pine Grove *v.* Talcott (19 Wall., 666, 67[illegible]): "It is an axiom of American jurisprudence, that a statute is not to be pronounced void upon this ground, unless the repugnancy to the Constitution be clear, and the conclusion that it exists inevitable. Every doubt is to be resolved in favor of the enactment."

It is submitted that the facts in the case at bar warrant the employment of the conservative method pursued by this Court in Antoni *v.* Greenhow (107 U. S., 769), in discussing the constitutionality of the act of Virginia there under consideration, and in the several other cases in point above mentioned, and that its em-

ployment must vindicate the constitutionality of the Missouri Act of March 8, 1879.

Respectfully submitted.

E. JOHN ELLIS,
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Attorneys for Plaintiff-in-Error.

Supreme Court of the United States.

OCTOBER TERM, 1888.

JAMES M. SEIBERT, Collector of Cape Girardeau County, Missouri,
Plaintiff in Error,

vs.

UNITED STATES, *ex rel.* GEORGE W. HARSHMAN,
Defendant in Error.

No. 130.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

Motion to Dismiss and Affirm.

Brief for Plaintiff in Error.

ELLIS, JOHNS & McKNIGHT,
Attorneys for Plaintiff-in-Error.

"lators and others against said county" in the Circuit Court—"that such levy, collection and distribution would be accepted by the relators and the other judgment creditors as a sufficient compliance by said County Court with the command of the said writ of mandamus."

The foregoing is from the statement of the case made by the learned Chief Justice and therein quoted by him, as if from the record of the case.

It is plain that in that case the relator had become bound by an agreement of his own to have his tax collected with the others, and take his *pro rata* of the ten-mill tax. The parties to the several judgments then united in a joint proceeding, similar to that instituted by the defendant in error in this case. Although, as in that case, the defendant in error might have proceeded in behalf of all the creditors, he did not. The object of the proceeding might have been to raise the whole tax, but that was not done. The relief asked for was to collect the relators' share, and this relief the court granted him, and only that relief. If the plaintiff in error could not collect a part of the tax, he did not say so in his return; and, if after an attempt, he had failed, the court might have relieved him.

The essential difference is that this defendant in error, neither in the court below or anywhere, has consented to unite with anybody else. He pays his own costs and litigates his own case, and shall he be forced to join with others *nolens volens?* What more could he do? The County Court levied a sufficient tax to pay his judgment, and certainly he could not proceed against it for contempt because it levied too much. He has nothing to do with the surplus, and cannot be connected with it. The plaintiff has purposely started to avoid these vexatious delays and keeps by himself for that purpose, and now shall it be said that, because the defendant in the execution chooses to collect more than enough to pay his judgment, he should suffer by their act? If this can be done, we are at the mercy of the defendant, and we are bound to forbid him from

doing more than we ask, although we had nothing to do with it and couldn't help it. We are made to join with others in spite of ourselves.

We submit, further, that the plaintiff in error has not given the bond required by law or the rule of court. He undertakes to give the bond which entitles him to a *supersedeas* and to respond in damages and costs. The statute (Sec. 1,000) and Rule 29 of this court require the indemnity to be at least equal to the amount of the judgment, damages and costs. This is for the sum of five hundred dollars only, not sufficient to cover a fair award for damages for the delay and the costs, not considering the judgment itself. The plaintiff in error is acting for himself in this matter. It is not the case of a municipality proceeding in its own behalf.

THE MOTION TO AFFIRM.

We ask that this case be affirmed, with damages. There is color for the dismissal of the writ of error, as before indicated. Can there be the slightest doubt that this writ of error was sued out purely for delay? Only a five hundred dollar bond is given; there is not a question raised which this court or the court below would hear an argument upon. The plaintiff in error says in his return that he has been enjoined by the State Court from proceeding to perform a duty commanded of him by the Federal Court. Is there the slightest doubt of his duty in the premises?

He don't even say that this is his excuse. He seems quite willing to proceed, but submits to the court whether he should go on, when a statute passed subsequently to the issue of the bonds for the purpose of defeating their collection is before him, when he knew that the court of which e asked the question had repeatedly held the statute null and void, and this court sustained it in numerous cases. (United States v. Ralls County, 105 U. S., 732). It is no wonder that he does not make a positive denial of the

right of the relator to enforce the collection. When the Court answered his inquiry and commanded him to proceed with his official duties, he waits many months and then brings the case here for three years' delay, to force the defendant in error to accept a compromise.

We submit that this is a frequent case; it is here on an amount less than the law requires; upon a bond wholly inadequate in amount; the plaintiff in error didn't claim, in the court below, that his return to the writ was sufficient; and on its face the record shows that the writ is frivolous and for delay only.

FISHER & ROWELL.

To the above named Plaintiff in Error:

Take notice that the Defendant in Error will present the foregoing motion on Monday, May 10, 1886.

FISHER & ROWELL,
for Defendant in Error.